

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JAMES J. MCNULTY,

Plaintiff

v.

GAP INC.,

Defendant

Civil Action No. 05-11250-NMG

DEFENDANT'S MOTION TO DISMISS
PLAINTIFF'S COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(6)

Defendant, Gap Inc. ("Gap"), hereby moves pursuant to Fed. R. Civ. P. 12(b)(6) for dismissal of Plaintiff's Complaint for failure to state a claim upon which relief can be granted. Plaintiff, a former employee, alleges in the Complaint that Gap failed to accommodate a disability and that it inflicted emotional distress upon him. Gap is moving to dismiss the complaint for failure to state a claim because Plaintiff did not file a charge of disability discrimination with the Massachusetts Commission Against Discrimination or the Equal Employment Opportunity Commission, as he was required to do, and the negligence claims are barred by the exclusivity provisions of Massachusetts' Workers' Compensation Act. The grounds for this motion are set forth more fully in the supporting memorandum and Affidavit of Daphne Broadnax filed herewith.

CERTIFICATION OF CONFERENCE – LOCAL RULE 7.1

Gap Inc. certifies that it, through its counsel Amanda S. Rosenfeld, attempted to confer with *pro se* Plaintiff about this Motion by calling him at 508-775-8658 on July 18, 2005 and leaving a detailed telephone message. On July 19, 2005, Plaintiff advised in a voicemail message to Amanda S. Rosenfeld that he does not consent to this Motion.

Respectfully submitted,
GAP INC.
By its attorneys,

/s/ Joan Ackerstein
Joan Ackerstein, BBO#348220
Amanda S. Rosenfeld, BBO#654101
Jackson Lewis LLP
75 Park Plaza
Boston, MA 02116
(617) 367-0025

Dated: July 21, 2005